United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 20311

DAVID LEROY DANIELS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

APPELLANT'S OPENING BRIEF

J. B. TIETZ
410 Douglas Building
257 S. Spring Street
Los Angeles, California
Attorney for Appellant

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Northern Division. The appellant was sentenced to custody of the Attorney General for a period of three years (R. 7).[1] Title 18, Section 3231, United States Code, conferred jurisdiction in the district court over the prosecution of this case. This court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law (R. 9).

1. R. refers to the typed Transcript of Record.

STATEMENT OF THE CASE

The indictment charged appellant with violation of the Universal Military Training and Service Act (R. 2-3). It was alleged that he became a registrant of Local Board No. 68 of the Selective Service System in the County of Fresno, State of California, and that having theretofore been duly classified in Class I-O, did knowingly refuse and fail to comply with the order of his said Local Board No. 68 to report to said board for instructions concerning civilian work (R. 2-3).

Appellant pleaded not guilty, waived jury trial and was tried and convicted on June 18, 1965 (R. 6). Judgment was pronounced on August 2, 1965 (R. 7).

A written motion for judgment of acquittal was filed (R. 4-5). The motion was denied (R. 6).

The motion and the hereinafter specified references to the trial proceedings (Rep. Tr.)[2] contain all of the grounds that the appellant relies upon for reversal of the judgment in this case.

Defendant called Jay Hathaway, a state official of the Selective Service System, but officed in Fresno with defendant's local board, as a witness. His testimony was that there was no one at the local board's office to give the defendant any test (medical, psychological, mental or otherwise) before sending him on to the designated place of employment (Rep. Tr. 12).

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2. Rep. Tr. refers to the (complete) reporter's transcript of the trial proceedings.

Defendant called Bernie Lee Daniels as a witness (R. 6) to show that the evidence of defendant concerning his ministry, in his Selective Service file (Ex.)[3] needed certain clarifications. The parties then stipulated the witness Daniels would testify that "pioneers" are witnesses who do 100 or more hours a month of field ministry work and that "vacation pioneers" are short term pioneers, and are required to do 75 or more field hours of ministry work each two weeks (Rep. Tr. 21-22).

Defendant, by permission of the court, proffered the following: "If permitted to testify the defendant would testify that his vocation is the ministry, that anything else he does to support himself is to earn bread for his vocation; that it is his lifetime work and that everything else is secondary to it; that in everything he did this was true; that he took the kind of secular work that permitted him to carry on his vocation in the evenings and on the weekends and he took the kind of jobs that permitted him to do as much pioneering as possible." (Rep. Tr. 47).

The trial court, nevertheless, ruled that none of defendant's evidence could be considered in defense to the indictment since he had not gone to the local board office, as ordered (Rep. Tr. 36).

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3. Ex. refers to the Government's exhibit, the selective service file of appellant. An Arabic number is the pagination which is found pencilled at the bottom of each sheet of the exhibit.

THE FACTS

Appellant was registered with the Selective Service System on November 10, 1960 (Exs. 1-2).

He signed Series VIII of the Classification Questionnaire (Ex. 7), thereby asserting he was a conscientious objector. He made the following entries in Series VII, the portion of the questionnaire relating to ministry:

"I am a minister and I have been formally ordained." (Ex. 7). He added a full sheet of particularization to support this statement (Ex. 9).

The first (and only) classification given him was I-O, that is, conscientious objector. He requested an Appearance Before Local Board and an appeal. These were given him but both his efforts were fruitless.

The local board sent him an order to report to its office in Fresno, the order informing him he would "be given instructions to proceed to the place of employment.", the name and address of the place of employment being specified in said order (Ex. 99). He had previously informed the board he could not do this work "due to my convictions" (Ex. 86) and he did not go to the local board's office.

QUESTIONS PRESENTED AND HOW RAISED

I

The record shows the court agreed with plaintiff that the failure of the defendant to report at the local board was a failure to exhaust administrative remedies (Rep. Tr. 23,

48). Should this have precluded defendant from presenting his defenses? The question was presented by the trial court's ruling.

II

The "merits" of defendant's points were not considered, because of the above threshold question (R. 48). Assuming defendant's Selective Service file (Ex.) and his oral evidence (R. 9, 18) support his motion for judgment of acquittal, namely, the denial of the claim for exemption as a minister of religion by the Selective Service System is without basis in fact, arbitrary, capricious and contrary to law (R. 4, point 2) was there a basis in fact for denying him a deferred classification?

SPECIFICATION OF ERRORS

I

The district court erred in failing to grant the motion for judgment of acquittal.

II

The district court erred in convicting the defendant and entering a judgment of guilty against him

SUMMARY OF ARGUMENT

I

The court should not have rejected appellant's evidence but should have rejected the government's argument, namely, that his failure to go to the local board, as ordered, was a failure to exhaust his administrative remedies and

that he was thereby precluded from presenting his defenses. *Donato* v. *United States,* 9 Cir., 1962, 302 F.2d 468, 470.

The two or three cases that hold a I-O registrant so ordered to report must report to the office of the local board are distinguishable from the facts of our case; moreover, those cases were in themselves wrongly decided.

II

Defendant-appellant made out a prima facie case, *Dickinson* v. *United States,* 1953, 74 S. Ct. 152, 157-158, and there is nothing in the record to rebut his evidence, Dickinson, at 159.

ARGUMENT

I

Appellant Exhausted His Administrative Remedies and Was in a Posture to Present His Defenses to the Indictment.

This threshold problem is dispositive of the appeal. If this Court disagrees with appellant's argument his second point (on the merits of his defense) need not be considered. If this Court agrees with his argument his conviction should be reversed.

Appellant had an administrative appeal (R. 11, 76) and therefore exhausted his administrative remedies.

We will argue (A) that this Court should take a hard look at its prior decision on this subject and (B) that, in any event, this case is distinguishable from its prior decision.

A.

Bjorson Is Wrong

Appellant had been ordered to report for an armed forces physical examination, as required by the regulations, on June 2, 1964 (R. 62). A statement of acceptability by the armed forces was entered (R. 74). The report of the examination, giving details, appears in the Selective Service file at pages 65-72. Neither the order to report for work of national importance nor the regulations commanding a compliance provided for the appellant to be reexamined at the hospital (R. 99). It merely stated that he would be given instruction to proceed to the state hospital at Los Angeles and "you will be instructed as to your duties at the place of employment." (R. 99).

The opinion of this court in *Bjorson* v. *United States,* 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960), is out of harmony with and in direct conflict with the holding of the Supreme Court in *Dodez* v. *United States,* 329 U.S. 338, 342-343, 345, 347 (1946). The Court held that Bjorson failed to go to the "brink." The Court erroneously equated the facts in the case to *Falbo* v. *United States,* 320 U.S. 549 (1944), whereas the facts are identical to the facts in *Dodez* v. *United States,* 329 U.S. 338 (1946). The regulations involved in this case and the regulations involved in *Dodez* v. *United States,* 329 U.S. 338 (1946), are substantially the same. They are identical insofar as the provision for no physical examination upon reporting for civilian work is concerned. The regulations at the time of both cases contemplated a complete and final physical examination long prior to the issuance of the order to report

for civilian work. No remedies of any kind or character remained, therefore, to be exhausted.

This case is entirely different from *Falbo* v. *United States,* 320 U.S. 549, 552-554 (1944), and is identical to *Dodez* v. *United States,* 329 U.S. 338, 342-343, 345, 347 (1946), which applied the doctrine of *Estep* v. *United States,* 327 U.S. 114, 115-116 (1946), but which this Court in *Bjorson* v. *United States,* 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960), overlooked.

The first question presented here, whether this Court in *Bjorson* v. *United States,* 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960), erroneously interpreted the regulations so as to require an illegal and vain act that would accomplish nothing in the way of exhausting administrative remedies, is of such great public importance, to require overruling Bjorson. There are hundreds of prosecutions under the criminal sanctions clause of the Act throughout the United States involving registrants who have refused to do civilian work and have also refused to report to their local boards or to the hospitals or other civilian work agencies. The Supreme Court in *Dodez* v. *United States,* 329 U.S. 338, 342-343, 345, 347 (1946), laid down the law of the land which authorizes defenses to be made under the criminal sanctions clause in circumstances identical to the facts in this case. The Court in *Bjorson* (272 F.2d 244 (9th Cir. 1959)) overlooked that in its holding appearing in those parts of the opinion under rubric "4. The Appellant Has Failed to Exhaust His Administrative Remedy: He Must Go to the 'Brink' " and "Conclusions," where the court says: "The appellant has failed to exhaust his administrative remedy."—272 F.2d at pp. 247, 250.

Taking judicial notice of the procedure prescribed by the regulations, the appearance in the Government's Exhibit (Order to Report for Civilian Work) (R. 99) conclusively shows that Daniels had previously submitted himself for a final type armed forces physical examination at the induction station and had been found acceptable by the local board and assigned by the Director for service in a hospital long before he was ordered to do civilian work.

In other words Daniels' status at the time he received the order to report at the local board and proceed to the hospital was exactly the same as the status of Estep at the time he was directed to submit to induction and the same as the status of all registrants at present when they have successfully undergone the armed forces physical examination procedure explained by the Supreme Court in *Estep* v. *United States*, 327 U.S. 114, 123, 124 (1946), and *Dodez* v. *United States*, 329 U.S. 338, 342-343, 345-348 (1946).

In *Dodez* v. *United States*, 329 U.S. 338 (1946), by a construction of the regulations and the Act it was ruled that at this point in the proceedings a registrant, when found physically and mentally fit, was to be deemed acceptable and is accepted. The very next step, the order to do civilian work, was not and is not a part of the selective process. Unmistakably, the court pointed out that in *Billings* v. *Truesdell*, 321 U.S. 542, 558, 559 (1944), the *Falbo* decision, 320 U.S. 549 (1944), was not to be construed as holding that a man must submit to induction before he could be said to have exhausted his administrative remedies, but that the selective process ended when he was

accepted and that thereafter he could refuse to submit to induction:

> "But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the Falbo case by subjecting those who reported for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the board's order to report."—*Billings* v. *Truesdell,* 321 U.S. 542, 558-559.

The foregoing quoted portion of the Billings opinion is a forcible demonstration of this Court's misapprehension, or overlooking of the regulations governing Bjorson's acceptance for and assignment to civilian work, and his status at the time he received the order to report for work. He was not indicted for failing to perform any one of the steps in the selective process, but was prosecuted and convicted for not having reported to the board for the sole purpose of going to the hospital. The last step in the selective process had been completed before the order for work had issued. He actually was indicted, prosecuted and convicted for refusal to do work and not for failing to take the last step in the selective process.

Therefore Bjorson's refusal to go to the board (272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960)) is the only assignable reason why the court of appeals ruled that he could not contest the legality of his classification in defense to the indictment. But under the above-quoted portion of the Billings opinion Bjorson did not have to be "actually inducted" or submit to the civilian work

order in order to raise this defense. He did not have to report to the board or to the hospital, be assigned and start to work there any more than did Billings have to take the army oath, be assigned to service in the armed forces and shoulder a gun. When Bjorson was found "physically and mentally qualified for general service" upon his final armed forces physical examination for work of national importance he had been officially and finally accepted, as indicated by the subsequent order to report for work sent by the board. Thus Bjorson exhausted his administrative remedies and under the rules set forth in the *Falbo* opinion itself as amended and clarified by *Billings* and *Dodez* he was then in a position to urge the illegality of his classification as a defense against the indictment.

It can be more readily understood that Bjorson had exhausted his administrative remedies when he successfully completed the final armed forces physical examination, when the rules governing registrants classified I-A, as announced in the *Billings* opinion are contrasted with his situation and that of Daniels here. Billings never received any assignment to an army base because such assignments were not given until after the selectee actually subscribed to the oath at the induction station. But as to conscientious objectors there is no ceremony of subscribing to an oath or other "brink" to mark the beginning of the civilian work process and the end of the selective process. For this reason conscientious objectors receive their assignments to work as a matter of course before order and after they are found to be acceptable. Then later they are merely ordered to report for the purpose of doing the work and not for selection.

The Supreme Court had no difficulty in holding that when Billings had taken the physical examination he had become accepted and had exhausted his administrative remedies, and his refusal to go further did not, under the *Falbo* rule, deprive him of the right to defend his classification in court. That being true in the case of I-A men, the same rule with greater force of reason applies to those classified as conscientious objectors. Assignment of I-O men to do civilian work is analogous to the assignment of an inductee to an army base after actual acceptance for induction.

The only difference is that in the case of I-O men the Selective Service System never loses its jurisdiction over the assignee as it does over every I-A man inducted into the armed forces. But the difference does not affect the analogy.

In both cases the assignment is beyond the mark of the end of the selective process and the administrative remedies and it is not necessary for the registrant to comply with an order to be inducted as a part of the "selective process." The final liability for duty and acceptance is fixed for the conscientious objector when he passes the physical examination, because he is thereupon declared acceptable for duty and service and given an assignment to do civilian work.

The regulations make it plain that *acceptance* of the registrant for work in a hospital as a conscientious objector takes place at the time he is found to be acceptable at the final armed forces physical examination, for if he successfully completes the examination he is thereafter, as a mat-

ter of course, assigned and then sent an order to report to the local board and subsequently to the hospital for work.

The language of the regulations and the practice of the Selective Service System thereunder indicate that the status of the man changes from that of a "registrant" at the time he receives the order from the board to report for transportation to the hospital to that of a "selectee" or "assignee." Under these considerations, it would be contrary to practice and reason to contend that the administrative process of selection had not been completed until he actually reported at the board.

Applying the rules announced in the *Falbo* and *Billings* cases in the light of the plain wording of the regulations above quoted it must be conceded that long before Bjorson and Daniels each received the notice to do work of national importance and at the time they successfully completed the armed forces physical examination, as to them the *selective process* had been completed, the government had made its choice and they had been finally accepted for civilian work.

In the case of each man (Bjorson and Daniels) these facts and his acquired qualification for judicial review certainly were in no way changed by his subsequent refusal to go to the board or go to the hospital and begin actual national service. It is true that he was prosecuted for that refusal, but the whole contention is that his defense pertaining to the illegality of the classification cannot be ruled out on the erroneous assumption that the selective process had not been completed and that he had not exhausted his administrative remedies.

In this case appellant is supported not only by the plain wording of the regulations and by the ruling in the *Billings* case but also by the reasonableness of the proposition. Any other view of the matter would lead to gross injustice and amount to a rule without reason. When a registrant successfully completes his final physical examination, then nothing else remains to be done except ordering him to report for work at the board and hospital at the time and place specified by the Selective Service System.

There are no more hearings, no more appeals, no more physical examinations. Therefore, if a construction and application were placed upon the regulations and the Act requiring the assignee to actually report at the hospital or to the local board to receive transportation to the hospital, as a condition precedent to his attempting to urge the illegality of his classification as a defense to the indictment, then that construction is objectionable on two grounds:

(1) It requires an assignee to do a vain and needless thing before he can avail himself of this admitted defense; and

(2) It makes a trap out of the regulations so as to inflict greater pains and penalties upon a recalcitrant assignee who defies the board by refusing to report and go to the hospital than are allowed by Congress in the Act to be inflicted upon one who goes to the hospital and there defies the agency with his physical refusal to perform work to which he is assigned.

Officials acting for the Selective Service System at hospitals are without authority to change any assignee's classification or of their own motion to provide for another

physical examination. All that the hospital officials can do is put the assignee to work. Obviously this is no administrative remedy and an assignee reporting to the board or to the hospital cannot expect to obtain any relief by going there. The situation is not helped if the selectee merely goes to the local board and refuses to accept transportation to the hospital.[4]

As to Bjorson and Daniels each the administrative process has been completed. Each had been selected, and the only thing required was to go to the board and to the hospital and begin service. To require one to perform this last step of submitting to work as a condition to his urging his defense against the indictment is a requirement without reason, vain and needless, for once he reports to the board or to the hospital as ordered there would be no reason to prosecute him, unless he sneaked out of the hospital by stealth and became a deserter. If he is prosecuted for leaving the hospital, that is another and different charge from the one under consideration. Here we are concerned only with a charge of refusal to report to the board for transportation to the hospital.

A construction of the Act and regulations that would require the assignee to perform the hypocritical act of going to the board merely to refuse to accept transportation to the hospital or to report at the hospital after he had

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4. Section 4 (a) of the Act provides that no order shall issue until after physical acceptability has been determined. Congress, therefore, contemplated exhaustion of the administrative remedies before the issuance of the order to do civilian work. (50 U.S.C. App. § 454.) The sections of the regulations prescribing the termination of the physical acceptability prior to the order are as follows: 1628.10, 1628.11, 1628.17, 1628.25, 1650.30. (32 C.F.R. §§ 1628.10, 1628.11, 1628.17, 1628.25, 1650.30.)

been accepted and assigned, in order to exhaust his remedies, is as absurd and immaterial as requiring the selectee to stand on his head or walk a tightrope before he can say that he has exhausted his administrative remedies and qualified himself for judicial review. Repeatedly the Supreme Court has held that it is not necessary to comply with hollow formalisms and futile remedies before it can be said that administrative remedies have been exhausted and judicial review is available. (*Utley* v. *St. Petersburg,* 292 U.S. 106 (1934); *Delaware & Hudson Co.* v. *Albany & Susq. R. Co.,* 213 U.S. 435 (1908); see also *N. L. R. B.* v. *Carlisle Lumber Co.,* 94 F.2d 138; *N. L. R. B.* v. *Sunshine Mining Co.,* 110 F.2d 780.) This principle was clearly expressed in *Ex parte Cohen,* 254 Fed. 711, a draft case arising during the first world war. There it was said: "It is true that he did not appeal to the district board, as perhaps he should have done, but he ought not to be denied his rights to habeas corpus where his personal liberty and nationality are involved because of his failure to have done a vain thing. The local board for some reason took the matter up with the district board, which board approved the action of the local board, and hence to have appealed to them would have been an act of folly." Denying the defendant here the defense which he sought to urge, and thus making his conviction certain, is just as serious as the reason relied on in the *Cohen* case to make unnecessary the compliance with vain administrative procedure.

Were the Act and regulations construed so as to require a selectee to report to a hospital or to his local board to obtain transportation to the hospital before he could urge

his defense, the requirement would be objectionable because it makes a trap out of the procedure and subjects assignees to greater pains and penalties than those provided for in the Act. Had Daniels gone to his local board and refused to accept transportation to the hospital he might have encountered some serious difficulties with the officials. Had he accepted the transportation and gone on to the hospital, then he would have been required to remain therein until released and could not voluntarily leave. The result in either case would be that he would run the risk of being subjected to additional and greater penalties than those provided in the Act. Besides, there always lurks the ever-present issue of waiver of rights by the one who voluntarily submits to the order.

Under regulations in effect when Daniels was ordered to report for work it seems plain that the possibility of rejection because of a change of physical condition some time between the date of his armed forces physical examination and the time he was scheduled to report at the hospital does not and cannot affect his right to judicial review. If he does not have a change or does not report a change of physical condition there will be no examination and no possibility of being rejected at the hospital.

Judicial review does not hinge on such chimerical uncertainties, especially when it is so plain that the regular administrative process of selection has been completed. It is utterly unreasonable that one, as a condition precedent to judicial review, should be required to appear at a hospital often hundreds if not thousands of miles away when he has previously been finally examined, declared *acceptable* as a

result thereof and ordered to report for civilian work. It is inescapable that the selective process ends when the registrant has been found acceptable after his armed forces physical examination.

Since this is true, then it is likewise true that the remote possibility of a conscientious objector's discharge after arrival at the board or hospital because of a change in physical condition (such as developing a disabling or mortal illness, being in a crippling accident or being otherwise incapacitated) should not cause the court to rule inconsistently that the assignee ordered to submit to work and who refuses for good cause to do so had not exhausted his administrative remedies. The fact is that in the case of the conscientious objector the selective process ended and the administrative remedies had been completely exhausted when he was found acceptable for service at his armed forces physical examination before being ordered to report for civilian work.

As to this error and misapprehension of the effect of the regulations in *Bjorson* v. *United States,* 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960), the appellant respectfully suggests that "it is never too late to be right." If it is followed here unchallenged by this Court it will work hardship not only on appellant but on thousands of others who now are or will be in a similar position, and in the future upon those who may be caught in similar circumstances under other administrative acts of Congress.

Another reason why it is unjust and unfair to require the appellant to report to the board is because he would be compelled to defend the case at Los Angeles out of the

area where his board is located and where he resided. The irreparable hardship of this rule of law can be demonstrated in places where the states do not use conscientious objectors to do work in state hospitals. In such instances the registrants are ordered frequently to go several hundred or even thousands of miles away from their places of residence and the place where their boards are located to an out-of-state hospital. It is conceivable under the regulations that a registrant could be ordered to do hospital work anywhere in the United States, which would include Hawaii or Alaska.

The injustice of having to be transported from Fresno or some other state or to faraway places for arraignment, bail fixing and prosecution is contrary to the "fair and just" provisions of the Act and irrefutably establishes that it is wholly unreasonable and confiscatory of constitutional rights to force a registrant to report at his local board in order to exhaust his administrative remedies. *Johnston* v. *United States,* 351 U.S. 215 (1956); compare the dissenting opinion, 351 U.S. at pp. 223-224, for a concise statement of the irreparable hardship that flows from reporting at a local board to receive travel papers to a distant hospital.

The Court should note that the Supreme Court of the United States denied certiorari in *Bjorson* v. *United States,* 362 U.S. 949 (1960). The denial of certiorari by the Supreme Court in that case does not import the approval of the Court of the holding therein that Bjorson had not exhausted his administrative remedies. There may have been another very good reason for the denial of certiorari. It was apparent that even if certiorari had been granted it

would be necessary to affirm the case on the merits of the claim of Bjorson that he was entitled to a IV-F classification because of his having been previously convicted for violation of the Act.

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." (*United States* v. *Carver,* 260 U.S. 482, 490 (1923)) It has been commented that notwithstanding this warning lower courts and members of the bar have persisted in giving weight to denial of certiorari. "The danger with which such indulgence in inference is attended would appear to be sufficiently demonstrated by the not inconsiderable number of cases in which the petition for certiorari has been denied on first application, but has been subsequently granted either on petition for rehearing or *sua sponte,* because of an intervening conflict of decision or because subsequent events imported into the case an element of importance it previously did not possess or because an apparent procedural defect had been cured or shown not to exist."—*Robertson and Kirkham—Jurisdiction of the Supreme Court of the United States,* Wolfson and Kurland, New York, Matthew Bender & Co., 1951 (page 60).

Bjorson v. *United States,* 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960), should be overruled, because it is contrary to *Dodez* v. *United States,* 329 U.S. 338, 342-343, 345, 347 (1946), and the "fair and just" provisions of the Act. See 50 U.S.C. § 451(c), which says that the procedure must be "fair and just." For the same reason Senior-Chief Circuit Judge Parker in *Barnette* v. *West Virginia State Board of Education,* 47 F. Supp. 251 (S.D. W. Va. 1942), refused to follow the Supreme Court of the

United States in *Gobitis* v. *Minersville School District,* 310 U.S. 586 (1940), so also this Court should refuse to follow *Bjorson* v. *United States,* 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960). See the many instances where even lower federal courts have refused to follow the decisions of higher courts in the federal system.—17 Tulane L. Rev. 497 (1943); 22 Oregon L. Rev. 198 (1943).

It is submitted that notwithstanding *Bjorson* v. *United States,* 272 F.2d 244 (9th Cir. 1959), cert. denied 362 U.S. 949 (1960), this Court should hold that appellant had no further remedies to exhaust and that the doctrine of exhaustion of administrative remedies was satisfied and complied with following the taking of the final armed forces physical examination and the declaration of acceptance by the army.

B

Bjorson Is Distinguishable

During the trial appellant argued that Bjorson was distinguishable from the appellant's case (Rep. Tr. 25). This argument is adopted.

Appellant emphasizes that there is nothing in the Bjorson opinion to indicate that he would have encountered any kind of examination at the Local Board; in any event the record in this case clearly shows appellant would have encountered nothing in the way of a "brink" at *his* local board (R. 12).

The trial judge commented that appellant might not have been accepted by the Department of Charities. Obviously, appellant's reply to the trial court was not per-

suasive. To the reply appellant then gave he adds the following:

In the case of *U. S. A.* v. *Dicke,* S. Dist. of Calif. No. 34998, Judge C. Nils Tavares, ruled:

> "THE COURT: Taking up, first, the motion of the Government to strike all testimony in behalf of the defendant on the ground that the defendant failed to exhaust his administrative remedies:
>
> "While there are some strong authorities favoring the Government's contention, particularly in this Circuit, I still feel that later decisions of other Circuit Courts of Appeal and the Supreme Court—and I think one or two even in the Ninth Circuit, by implication—have shown a tendency not to apply literally, in every case, the rule stated in Falbo v. United States in 320 U.S. 549, a 1944 decision.
>
> "In this case, the Court feels that the defendant, being a clean, healthy, young man of high principles, and having omitted only the last step of presenting himself to the Los Angeles County Department of Charities, there is no doubt that he would have been accepted for employment had he so presented himself; and therefore, I feel that the contention that he failed to take the last step is somewhat insubstantial in the particular circumstances of this case. I can't conceive of the Los Angeles Department of Charities turning down a man like this for any kind of work reasonably suited to a healthy, a young man in their Department.
>
> "The motion of the Government is, therefore, denied."

What was said about defendant Dicke applies equally to appellant Daniels. Each had had a preinduction phys-

ical, each is one of Jehovah's witnesses and each would be considered desirable employees by the Los Angeles Department of Charities.

Compare *Mason* v. *United States,* 9th Cir., 1955, 218 F.2d 375. In Mason, this court considered a parallel of the "brink" problem: Mason contended he didn't have to go to the induction station to "exhaust his administrative remedies" because he had had a pre-induction physical examination. This court held that he was required to go there because his pre-induction physical examination was two years before; that he would have been given another physical examination at the time he was ordered to report for induction because of the remoteness of the first one, the current regulations being cited as authority for this statement. Therefore, this court concluded, he might have been rejected at the induction station. In our case, as we have seen from the record, there was no further examination whatever for Daniels to have taken.

II

There Was No Basis in Fact for Denying Appellant's Claim for a Minister's Classification.

The record shows appellant made claim for a minister's classification and presented evidence he was ". . . a minister" and that he had ". . . been formally ordained." (Ex. 7)

There was ample corroboration. (Ex. 9, 15-54)

There is nothing in the file that reasonably contradicts his evidence.

Appellant presented a prima facie case for a IV-D classification (minister's status). No contrary evidence,

if any existed, was ever placed in the file. Therefore, he should have been classified in Class IV-D. it was incumbent on the board to place adverse evidence in the file, as a justification for rejecting his claim. *Dickinson* v. *United States,* 74 S. Ct. 152, 159.

Selective Service System regulation, 32 C.F.R., Sec. 1623.2, requires that a registrant be classified in the "lowest" class, according to a table which placed IV-D "lower" than I-O.

> 1623.2 Consideration of Classes.—Every registrant shall be placed on Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following tables:

Class:		Class:	
	I-A-O		IV-B
	I-O		IV-C
	I-S		IV-D
	I-Y		IV-F
	II-A		IV-A
	II-C		V-A
	II-S		I-W
	I-D		I-C
	III-A		

Regulation 32 C.F.R. § 1622.43 governs classification of registrants presenting evidence for a minister's status.

1622.43 Class IV-D: Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of Title I of the Universal Military Training and Service Act, as amended, contains in part the following provisions:

"Sec. 16. When used in this title— * * * (g) (1) the term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and

teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

"Vocation" is the chief consideration. "Full-time" is nowhere mentioned; nor is "part-time" mentioned. Nor is the word "Pioneer" or any equivalent expression used. Neither hours of activity nor clerical title are recognized by the Act or the regulations as factors in classifying.

Ministerial activity that is "irregular" is stated to be a disqualification. This consideration does not apply here. Appellant's uncontradicted evidence is that he regularly performed enumerated clerical activity.

The only other disqualifying consideration mentioned by law is "incidental". Here there was no finding by the board on this factor. Appellant's factual and relevant testimony was to the contrary. None was rebutted. The final step of his processing by the Selective Service System shows that he didn't regard his ministerial work as

incidental to other work but as something so important to him that he willingly faced a prison term when it became clear that the I-O classification given him would interfere with his obligation to Jehovah.

Thus, there can be no doubt that Appellant Daniels made out a prima facie case, and an unrebutted one.

CONCLUSION

For the reasons above stated, the judgment of the district court should be reversed and an order entered directing the district court to render and enter a judgment of acquittal. In the event this Court finds no basis for acquittal, then the Court should reverse the case and order a new trial because of the errors committed in the ruling on the evidence and the holding that appellant failed to exhaust his administrative remedies.

Respectfully submitted,

J. B. TIETZ,
Attorney for Appellant

JANUARY 6, 1966

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ,
Attorney for Appellant